

123rd Session of the ILO-AT

Summary

In its 123rd session the Tribunal delivered a total of 97 judgments, of which 33¹ cases involving the EPO. Of the EPO cases, only 3 cases were partially won² by the complainants. Of the remaining cases 13 were summarily dismissed. In the 123rd session the Tribunal again stressed that it will only judge on “individual” decisions, thereby confirming its unwillingness to exercise normative control. Its tendency to send cases back to the EPO further contributes to the backlog at the EPO and at the Tribunal.

Early delivery of “special” cases

The ILO-AT sits twice a year, in October and in May. The Judgments are normally delivered in the first week of February and in the first week of July. The 123rd session of the Tribunal was unusual in that – for the first time in the history of the Tribunal – some Judgments were delivered on 30 November 2016, i.e. shortly after the session itself. The remaining Judgments were delivered at the usual time, i.e. in the first week of February 2017. The explanation for the earlier delivery given by the Tribunal was that two of these cases have a considerable impact on the appeals system of the Organisation (the EPO) for other cases and on the finances of the Organisations concerned (WMO and Global Fund). Both of the EPO cases (discussed below) were decided on formal aspects and remitted to the Organisation to deal with the substance. Such remittals increase the workload and the already substantial delays at the EPO and at ILO-AT, and prolong the legal insecurity for the parties.

EPO special case 1: competent authority³

In the case leading to [Judgment 3796](#) the complainant challenged decision [CA/D 10/14](#) of the Administrative Council (introduction of the new career system) by filing a request for review at the Administrative Council. The Administrative Council dismissed all the requests for review of the above decision, including the complainant's. In its Judgment, the Tribunal pointed at Articles 107-109 of the EPO Service Regulations, which it interprets as giving the employee the right to challenge **individual decisions** - *only*. On its own volition, the Tribunal further examined whether the Council was the authority competent to issue that decision and found that it was not. Referring to [Judgment 3700](#) of the previous session, it held that the request for review should have been filed with the **appointing authority**, which in the case of the complainant was the President of the Office. The decision of the Chairman of the Administrative Council was thus set aside and the case remitted to the President with the order to take a decision on the complainant's request for review within two months.

¹ The high number of Judgments dealt with in this session made it impossible to report on all cases and forced us to ignore some cases that would have merited a discussion.

² Only cases that were won on the substance are considered as won. Cases that only led to an award of costs and damages for procedural delays are considered lost. Note that whereas many cases are fully (even summarily) dismissed, the few cases that were won are only partially won.

³ See annex 1 for a more detailed legal analysis.

EPO special case 2: composition of the Appeals Committee

In the case leading to [Judgment 3785](#) the complainant challenged an EPO examining Practice and Procedure Notice ([PPN 05/13](#)). The appeal was dealt with by an Appeals Committee that did not include the two Members appointed by the Central Staff Committee but elected Members of the Staff Committee who, at the demand of Mr Battistelli, had volunteered for the job. The complainant raised an objection against what he considered to be an irregular composition of the Appeals Committee⁴. Referring to Art. 5(3) of the implementing rules to Art. 106-113, the Tribunal agreed with the complainant that the two Members who were volunteers did not meet the criteria of the Service Regulations, "therefore the composition of the Appeals Committee cannot be considered to be the balanced composition as provided for by the rules" (point 7 of the reasons). The Tribunal sent the case back to the President "for examination by an Appeals Committee composed in accordance with the applicable rules". The Tribunal did not indicate what Rules should be applied (the Regulations in force at the relevant time or possibly new ones). It did not set a time limit either, thereby leaving the EPO great freedom in the interpretation of the Judgment and total freedom in the time-frame in which to apply it.

Follow-up by the Office and consequences

The complaint dealt with in [Judgment 3796](#) ("Administrative Council not competent") is not an isolated case: there are a considerable number of similar cases challenging the many recent reforms are pending at ILO-AT. The administration has since addressed the complainants with a letter informing them that the Administrative Council has "withdrawn" its decision on the (original) request for review and referred it to the President. The complainants are asked to withdraw their complaint. For the complainant that means "back to start". Moreover, the outcome of the request for review and any following complaint is foreseeable for the majority of the cases: the request will be considered irreceivable as concerning a general decision as opposed to an individual decision, unless the complainant is immediately personally affected. Until recently the Tribunal allowed at least Staff Committee members to challenge general decisions on behalf of staff. This may now also no longer be the case. From the recent jurisprudence **it seems that the only way to challenge Mr Battistelli's reforms that is now still open is through individual implementing decisions, i.e. through complaints by individual staff members who are negatively affected by a decision of the President implementing one or other aspect of the general decision and only once they are actually affected.** This lack of timely general normative control is highly unsatisfactory for staff and ultimately also for the Office as it creates legal uncertainty. It furthermore dramatically increases the workload of the Tribunal that will have to deal with a whole series of individual cases rather than decide on the basic issues.

The reaction of Mr Battistelli to [Judgment 3785](#) ("composition of the Appeals Committee") was to ask the Administrative Council to change the applicable rules⁵ and give him even greater powers to make appointments to the Appeals Committee that should be made by the Staff Committee⁶. The regulations now foresee not only "volunteers" but also, in case there are insufficient volunteers, the nomination of Staff Committee Members selected through the drawing of lots. Indeed, three of the four nominees in the present committee were selected in this manner. This hardly seems the "balanced composition" referred to in the relevant Judgment. It seems that the new rules are being applied retroactively to all cases sent back (or where all final decisions have been withdrawn). This is against the fundamental principle of non-retroactivity of laws, which has been consistently affirmed by the ILO-AT (including against the EPO, most recently in [Judgment 3214](#)).

⁴ According to the EPO the complainant's request for review had been late-filed. Normally the Tribunal is extremely strict with such matters. Curiously in this case the Tribunal did **not** decide on timeliness arguing that the properly constituted Appeals Committee « *can adopt the approach that non-compliance with the time limit in relation to the first step can be waived or that the time limit has been met.* »

⁵ New Article 36(2)(a) ServRegs

⁶ See [su16062mp](#). The CSC made appointments to the Appeals Committee under the condition that the existing problems with the functioning of the Appeals Committee would be addressed (our previous full members were both down-graded accused of « not supporting the process »).

The reaction of the Tribunal

We would therefore have expected that the reaction of the EPO to [Judgment 3785](#) (change the regulations rather than the practice) **not** to be condoned by the Tribunal. But apparently we were wrong. At the start of the reading of the remaining Judgments of the 123th session the President of the Tribunal, Mr Rouiller, stated: "*The Tribunal notes with satisfaction that the European Patent Organisation has already taken specific measures to address the orders contained in the two judgments that concern this organisation*⁷."

Already in the past the Tribunal has been criticized for a lack of normative control⁸: it checks whether its Member Organisations follow their own rules but leaves the Organisations a large discretion in setting those rules. If the Tribunal indeed endorses this "work-around" of its Judgments by the Office then that would be a new historical low.

In his introductory statements Mr Rouiller also referred to a recent Dutch court case, saying: "*I will also take this opportunity to bring to your attention a recent judgment of the Supreme Court of the Netherlands dated 20 January 2017, which upheld the integrity of the appeals mechanism of the EPO and the Tribunal's role in it.*"

We refer to [CA/21/15](#) and [CA/20/16](#) pages 55 et seq. for the "integrity" of the EPO's appeals mechanism: in 2015 the outcome of the cases was in 98% negative for staff⁹. Unless one sincerely believes that the President is always right and staff is always wrong, with such figure, there seems to be a problem in the system somewhere. We further note that the Tribunal has just found that the Appeals Committee was improperly constituted, not only once but *twice in a row*¹⁰. When Mr Rouiller approvingly cited the Dutch Court on the "*integrity of the appeals mechanism of the EPO*" he thus ignored the Tribunal's own findings in his respect.

Mr Rouiller also ignored the fact that the Dutch Supreme Court focused on the question of EPO's immunity and of alternative remedy. It did not rule on the substance of the complaints. The original finding of the Court of Appeal – that the EPO has violated fundamental human rights – is therefore still very much valid.

The satisfaction of the Tribunal with the current developments, in particular with its own recent Judgments can also be seen in a recent ILO document¹¹ where it is stated about the cases dealt with in the above two Judgments: "*Those two types of final decisions had been the subject of hundreds of complaints already before the Tribunal, and as they are now withdrawn and depending on how these cases will be dealt with by the European Patent Office internally, one could reasonably expect a significant decrease in the Tribunal's current caseload.*" But that decrease in the caseload will only last until the cases come back.

What next?

The latest development is that the administration has written to staff members who have cases that could be affected by the above Judgments informing them that the final decisions have been withdrawn and that the complaint thus is moot. We refer to Annex 1 and the references therein for advice of what to do if you are concerned. Template replies explaining the situation are provided. Basically: do **not** to withdraw your complaint until the situation has become more clear.

⁷ The relatively favourable rulings (no award of damages or costs in both cases, no time limit set for [Judgment 3785](#)) and apparent satisfaction of Mr Rouiller with what is by any objective standards a highly unsatisfactory reaction of the Office to [Judgment 3785](#) could raise the suspicion that there has been a prior agreement between the Office and the Tribunal.

⁸ <http://www.ilo.org/public/english/staffun/info/iloat/>

⁹ See the article « Institutionalised injustice » , [SUEPO resists of Jun 2016 \(su16086mp\)](#)

¹⁰ Judgments [3785](#) and [3694](#)

¹¹ [GB.329/PFA/11/1](#) (20 Feb. 2017)

“Special” non-EPO cases.

The Judgments on the non-EPO cases pronounced in November 2016 were more favorable for the complainants. Both of these cases concern **dismissals**. In both cases the Tribunal ordered the complainants to be reinstated¹². In the case decided in [Judgment 3750](#) reinstatement was ordered despite the complainant having signed a separation agreement intended to block any future appeals against the separation. The Tribunal found that the Organisation misled the complainant, put her under undue pressure to sign the agreement by giving her the false impression that her performance had been insufficient, whilst in reality it was not. This vitiated her consent in signing the agreement. Consequently the Tribunal declared the agreement null and void. It ordered her reinstatement with retro-active payment of her full salary and other entitlements from the date of separation, less the amount paid through the separation agreement and any net earnings received in that period, plus 5% interest per year, as well as 10.000 Swiss francs in damages and 2.000 Swiss francs in costs.

[Judgment 3723](#) concerns an **application for execution** of earlier [Judgment 3348](#). The complainant had been summarily dismissed in January 2011. In the earlier Judgment the Tribunal had ordered reinstatement with payment of *“the salary and other emoluments that he would have been paid between the time of his dismissal and the time of his reinstatement, less any amounts he has, in that time, received by way of salary from other employment.”* The Organisation interpreted the Judgment as not covering payments to the pension fund and membership to the health insurance. It also deducted unemployment benefits and “rental fees” from the amount due. The Tribunal disagreed with the Organisation on the pension benefits, the health insurance and the employment benefits, the latter not being “salary”. With respect to the employment benefits the Tribunal noted that the complainant may well have to pay these back to the national authorities. Concerning the claimed “rental fees” the Tribunal held that these had at the time been declared as “salary” and hence the deduction was in agreement with the earlier Judgment. The complainant also argued that the Organisation should have deducted only his **net** earnings from employment over the period concerned and paid **interest** on the sums retro-actively paid. On the taxation issue the Tribunal stated that the order “plainly referred to the gross salary”. It continued: *“The fact that the complainant was obliged to pay tax on that salary is an incidence of the national taxation law. While there are arguments in support and against this approach, the particular order in the present case was clear.”* Why this should be “plain” or “clear” is not at all evident because nothing was mentioned about this in the original Judgment. It seems that the Tribunal is in fact trying to hide a lack of substantive argumentation behind bold statements. It is further noted that there is a lack of consistency between this and the above [Judgment 3750](#) (above) delivered in the same session. The same applies for the 5% annual interest. The original Judgment did not order such a payment of interests. The follow-up [Judgment 3723](#) avoids a direct reply to the claim made by the complainant but awards 5% interest *only* to the sums unduly withheld by the Organisation.

These are, however, only minor quibbles. By and large the above decisions seem fair and should serve as a warning to International Organisations. They also give hope that the unfair dismissals of three staff representatives (all union officials) and the down-grading of three others by the EPO will eventually find justice.

EPO-related complaints - summary dismissals

The complaints dealt with in Judgments [3802](#) – [3814](#) were all dismissed in summary procedure. All of these complaints were filed rather recently by ILO-AT standards, the oldest complaints having been filed in Nov. / Dec. 2015. It therefore looks like the Tribunal has set out reducing its backlog and “making points” by throwing a batch of what it considers as easy files out of the cupboard.

The reasons for the complaints to be summarily dismissed were several:

- 1) the complaint is **time-barred** (e.g. Judgments [3802-3805](#), [3814](#)),

¹²This is in itself unusual: the Tribunal frequently leaves the Organisation the choice between reinstatement or the simple payment of a compensation.

- 2) the complainant failed to exhaust **internal remedies** (e.g. [Judgment 3813](#)),
- 3) the complainant challenged a **general decision** (by the Administrative Council) (e.g. Judgments [3809-3811](#)),
- 4) the **authority** that took the decision (the Administrative Council) was **not competent** to do so,
- 5) the complainant had no cause of action because there was **no personal injury** (Judgments [3807](#), [3808](#)),
- 6) the administrative act (a warning letter) was “merely a step in the procedure” ([Judgment 3806](#)).

For points 1) and 2) we have repeatedly warned staff that the Tribunal is unforgiving in these matters¹³. *The deadline for filing a complaint is 90 days* (not 3 months!) from the date of notice of the decision. The Tribunal generously counts as date of receipt the date on which the complaint was posted – *provided this can be proven*. If not (e.g. because the post-stamp is not legible) then the date of arrival at the Tribunal counts. We strongly recommend staff not to wait until the very last possible day for sending a complaint and not to rely on the post-stamp (in particular in the case of a relatively late filing) but to send the complaint by registered mail.

Similarly, *it is pointless to file a complaint at the Tribunal unless you have exhausted your internal remedies* (normally: request for review and internal appeal). **Please verify that your complaint meets these formal requirements**¹⁴ if you have one or more complaints pending. You may check with your staff representation or a local legal expert in case of doubt¹⁵. But do not continue with a complaint that clearly does not meet the formal requirements since this merely clogs up the system.

Points 3) and 4) frequently occur together since, except for e.g. appointments in the Boards of Appeals, most decisions of the Administrative Council are general decisions. The practice of filing complaints against **legislative decisions of the Council** rather than the **implementing decisions of the President** is, in fact, relatively new and basically started with the pension mass appeal in some five years ago. The new practice has now been judged incorrect by the Tribunal. It means that the appeal must (again) be directed against the implementing decision of the President. This would appear, per se, not problematic. However, the Tribunal's stricter interpretation on staff's (in-)ability to challenge general decisions, including those by the President, until they are individually applied is a problem. For instance, in the case of [CA/D 10/14](#), the fact that there would be no automatic step advancement affected every staff member directly and adversely. It just materialized for each staff member at a different time. Considering that the Tribunal, in the past, simply wanted complainants to prove a certain or potential injury, an appeal against [CA/D 10/14](#), at least to the extent of protesting against the removal of automatic step advancement, ought to be allowed. As indicated above, the Tribunal's new approach, creates a huge legal uncertainty for staff and for the Organisation. The insistence on the need to obtain **individual** decisions on an underlying general decision further leads to a multitude of complaints, each of which is likely to be slightly different. This increases the workload and the costs for all concerned, including for the Tribunal. Until recently the Tribunal granted individual Staff Committee Members¹⁶ the right to challenge general decisions, exactly for that reason: it is more efficient than dealing with a large number of individual appeals. But ILO-AT seems to be having second thoughts on this as well, see [Judgment 3615](#).

The summary dismissals of complaints with the argument of **lack of personal injury** (point 5) concern two cases where the complainant challenged the transfer of the tax compensation from the Member States to the Organisation. Since the costs are – at least initially – borne by the Organisation the staff members are considered not to be affected. This is open to discussion. Mr Battistelli's insistence on the Organisation's financial health and the constraints that he imposed on staff costs shows that – in the long run – staff will pay the price. The refusal of ILO-AT to deal with what was in our opinion an *ultra*

¹³Judgment 3785 (one of the « special » cases) of this session is a curious exception. The Organisation claimed that the complaint was time-barred. The Tribunal put that question off and remitted the case to the EPO.

¹⁴ [Judgment 3644](#) (Consideration 14)

¹⁵ Beware : if you have any form of negative reply from the Office this may be relied upon by the Office as a « decision ». Further exchanges with the administration do not affect the deadline for filing a request for review.

¹⁶ Staff Associations (Staff Committees or Staff Unions) as a body do not have standing at the ILOAT.

vires decision, that moreover was estopped¹⁷, again illustrates the lack of normative control over decisions taken by the Organisation.

The last case mentioned above (point 6) refers to earlier Judgments ([3697](#), [3629](#), [3512](#) and [3433](#)) that hold that a **warning letter** is according to the Tribunal “*merely a step in the procedure*” (of performance evaluation) and “*as such cannot be the subject of a complaint*”. Again, this is open to discussion. But it is likely that the Tribunal will adhere to its jurisprudence in this respect.

Regular (full) EPO Judgments

In the Judgments discussed above we saw the Tribunal ordering deduction of the **net** income from employment from the compensation awarded whereas it in Judgment [3723](#) ordered the deduction of the **gross** salary in a situation that seems identical. For that it awarded interests on the arrears which it did not in the former case. Unexplained inconsistencies between Judgments are not unusual at the ILO-AT. These may be due to oversight, different approaches being taken by different judges and/or developments in case law.

We see another example of inconsistency in this session. The Tribunal summarily dismissed **most complaints directed against decisions of the Administrative Council** and decided by the Council, quashing those decisions without further instructions. But it equally dismissed some using the normal procedure, see e.g. Judgments [3786](#) and [3796](#). In the latter cases the Tribunal further set the Office a relatively short dead-line: it remitted the cases to the President for decision within two months of the delivery of the Judgment. In [Judgment 3785](#) it set none, thereby leaving the Office unlimited time to deal with the case.

Recognition degrees / previous experience

The recognition of degrees and **previous professional experience** is a recurring theme in the Tribunal’s case law. Also in this session, several Judgments deal with this matter. We will not go into each one of those because such cases are by nature highly dependent on the personal situation. One case does, however, merit mention. In [Judgment 3784](#) a job applicant was originally informed that his post was in category A, grade 3, and that he would occupy step 7 within that grade. However, according to the calculation of reckonable experience enclosed with that offer the post was a category A, grade 1, step 1. The complainant accepted the job offer but challenged the calculation half a year later. In an exchange with the complainant the Director of Personnel apparently stated that he appreciated the complainant’s 18 years of professional experience prior to his recruitment which was an important reason why he had been offered employment, but that “*the EPO followed a strict application of the rule set out in Circular No. 271*”¹⁸.

The Tribunal found the complaint irreceivable because the complainant did not file his internal appeal within three months after the initial decision. According to the Tribunal to do otherwise would “*impair the necessary stability of the parties’ legal relations*” (point 4). This reasoning is surprising. If the latest salary is taken as a basis for an appeal, the appeal, if successful, would normally have a retro-activity of only three months. These three months would hardly “impair the stability of the parties’ legal relations”, in particular considering that the duration of the rest of the procedure is now up to 9 years.

This latest Judgment apparently follows [Judgment 3614](#) of session 121 issued a year ago. In said Judgment the Tribunal tries to reconcile the two approaches taken in the past ([Judgment 2951](#): pay-slip as a recurrent decision vs [Judgment 2833](#): pay-slip merely confirms an earlier decision). In [Judgment 3614](#) the Tribunal asserts (without providing any evidence) that the rationale for allowing appeals based

¹⁷ All the EPO Member States agreed to reimburse 50% of the tax adjustment to the Organisation when they created or joined the Organisation. The sudden decision of the delegations in the Admin. Council to transfer these liabilities to the EPO – to the benefit of the Member States and to the detriment of the Organisation whose interests they are suppose to represent - seems tainted by conflict of interest and abuse of power.

¹⁸ “*In exceptional cases and having regard to the opinion of the selection board, the President may decide that a candidates qualifications justify a more favourable grading, subject to the minimum criteria laid down in the job description and the most rapid career available to EPO staff.*”

on pay-slips is to resolve a situation wherein the staff member has no other basis. It concludes that where there is an explicit decision, this decision should be challenged within three months.

In the above case the Tribunal also found the complaint unfounded on its merits holding that decision on a more favourable grading is of discretionary nature and will only be set aside “*if that decision was taken without authority or in breach of rule of form or of procedure, or if it was based on a mistake of fact or law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. The complainant has not provided that the decision is flawed on any of these grounds*” (a standard phrase that is often used by the Tribunal). The complaint was dismissed in its entirety.

Additional rules

[Judgment 3793](#) leaves us speechless. In this Judgment the Tribunal allowed the application, by the Office, of an *additional rule for which there is no basis in the Service Regulations*. Moreover, *the Tribunal considered its case law as sufficient information about the EPO’s practice in this respect*. In this case the complainant applied for **dependent’s allowance for his mother**. According to Article 70 of the ServRegs such allowance may be granted where a permanent employee, or her/his spouse “*mainly and continuously supports a parent or other relative, by blood or marriage, by virtue of a legal or judicial obligation*”. The complainant’s request was initially refused by the Office because the income of the complainant’s mother was held to be more than half of the cost of living, so that he could not be considered “mainly supporting” her. In front of the Tribunal the EPO acknowledged that an error had been made in the calculation of the cost of living in Egypt and that the complainant does contribute more than half of the costs of living for his mother. The EPO argued, however, that another condition must be met “*in keeping with long standing practice*”, namely that the support paid must exceed 6 percent of the basic salary plus the allowance that would be granted for the dependent. The complainant argued that the EPO cannot apply conditions that are not in the Service Regulations and that have never been made public. Under point 7 the Tribunal held: “*The complainant’s assertion that the EPO introduced an additional condition ... is without foundation. In fact, as shown in [Judgment 1142](#), the same requirement ... was part of the EPO’s practice ... as early as 1992, and this Judgment is on public record.*”

This ruling goes against the Tribunal’s earlier jurisprudence that a party relying on established practice instead of written law has the duty to prove that such practice existed and was considered established. It is also in contrast with the – in our opinion much more reasonable - ruling in [Judgment 3781](#) in the same session: see below.

EPO cases partially won by staff

The case decided in [Judgment 3781](#) concerns a request **for education allowance** for children who were moved from the European School in Munich (ESM) to be enrolled in the Munich International School (MIS). In May 2008 (sic) the complainant requested reimbursement of the school fees basing herself on Article 120a of the Service Regulations. This request was refused. The relevant part of Article 120(a) ServRegs reads: “*Where an employee is unable to have his children educated at a European School for reasons beyond his control, the Office shall on request pay fees charged by an international school for educating the child.*” The details of the case are complex and will not be set out here. Essentially: the EPO argued that a certificate from the ESM stating that the nature of the educational establishment is not apt for the child in question is decisive in this respect¹⁹, but that reimbursement could also be granted under various other circumstances, apparently at the discretion of the EPO. The Tribunal strongly criticized the EPO for not having defined the meaning of “reasons beyond his control”. It pointed out that the wording of the relevant Article (“*the Office shall on request pay fees*”) does not allow for discretionary application. Under point 19 the Tribunal held that “*in addition to arriving at an interpretation of the phrase at issue, the EPO was obliged to make the interpretation known to the employees through circulars or whatever means used to communicate such information to employees*”. We agree with the position of the Tribunal taken here, but we cannot fail to

¹⁹In our experience the willingness to provide such a statement or not very much depends on the Director of the School at the relevant time, some being highly reluctant to make such a statement.

notice the sharp contrast with [Judgment 3793](#) above where an earlier ILOAT Judgment was held to be sufficient information for staff.

In the present case the Tribunal found that the complainant had made it credible that her son(s) could not be educated at the ESM due to “*circumstances or conditions ... which are not brought about by the employee, either in whole or in part, which has the result that it is undesirable and inappropriate, viewed objectively and reasonably, for the child to attend the European School, Article 120a ... is engaged.*” The complainant thus won on the substance of her arguments for the years for which she requested reimbursement (being misinformed by the Office she apparently failed to do so for certain years). The EPO was ordered to reimburse the complainant the school fees for the 2007-2008 school year (only), with interest at the rate of 5% per annum. The complainant was further awarded 20,000 euros in moral damages for the EPO’s failure to inform her which was considered a serious breach in its duty of care, as well as 750 euros in costs. In deciding so, the Tribunal broadly agreed with the minority opinion of the Appeals Committee, which shows how important a balanced composition is.

Round and round and round ...

[Judgment 3792](#) concerns a request for application for execution of earlier Judgment 3045. In its previous judgment the Tribunal held that in July and September 2008 the EPO had, without any legal basis, denied the complainant the possibility of changing the medical practitioner whom he had initially appointed to the Medical Committee. It therefore sent the case back to the EPO for referral to a properly constituted Medical Committee. In June 2013 the new medical committee found no occupational accident but suspected an occupational disease, which required the Office to appoint an expert. When the application for execution was filed in March 2015, the Office’s expert still had not been appointed. Since then the procedure progressed but was still pending, more than 5 years after the delivery of the previous Judgment and almost 9 years (!) after the original decision. The Tribunal concluded that “*the Organisation has therefore seriously breached its duty to execute within a reasonable period of time*”. We agree with the conclusion of the Tribunal. But for all we know the procedure may still be pending. *This illustrates how powerless staff – and the Tribunal – are when confronted with the ill will of the EPO administration.* Some colleagues are sent around in circles until they finally give up. This is particularly disgraceful when sick and invalid staff is concerned. Apparently the Tribunal was of the same opinion. It awarded the complainant a substantial compensation for moral injury (20 k€) as well as 500 € costs.

CONCLUSIONS

Staff members in the EPO are suffering under an autocratic President who has little, if any respect for the Rule of Law and who continues to impose reforms that violate basic norms and Fundamental Rights that most European citizens enjoy. Staff members (including managers) and staff representatives who criticize Mr Battistelli’s regime are shelved, down-graded or otherwise eliminated without having a chance to publicly defend their case due to oppressive regulations on confidentiality. Amongst the reforms are several that have affected the internal appeals system and essentially rendered it dysfunctional. The EPO no longer has functional internal conflict resolving mechanisms. In 2016, 98% of the appeals launched by staff were rejected²⁰. For staff and their representation the only legal route available to challenge unfair treatment by the EPO is ultimately at ILO-AT.

The case-load coming from the EPO has caused long delays at the ILO-AT. Thus far the reaction of ILO and the Tribunal has been disappointing. The Director-General of ILO (an organization that claims to defend workers’ rights!) and the Tribunal (supposed to be neutral) has discussed the matter with the EPO management only, ignoring repeated requests from the staff representation to be involved. The Tribunal has always claimed and still claims to apply “general principles” of law but thus far staff at the EPO has rarely seen these “general principles” applied to its advantage. Increasing numbers of complaints are dismissed for formal reasons or sent back to the EPO where they are likely to be rejected again. The impression given is that the Tribunal has carefully avoids exercising any normative control over the EPO. The question is: why?

²⁰ See [CA/21/15](#) and [CA/20/16](#), page 55 et seq., or [su16086cp](#) page 3 for an overview.

ANNEX 1

Judgment 3796 – some further comments

Judgment 3796 relies on [Judgment 3700](#) of the previous session for its reasoning. Both Judgments apparently try to lay down some ground rules for the competence of the two Appointing Authorities of the EPO (the President and the Administrative Council) when dealing with legal challenges from staff.

The reasoning in these Judgments appears, however, difficult to reconcile with the idea behind the reform of 2012, see [CA/54/12](#), point 30 (bold-face added):

Other decisions which are subject only to management review are those taken by the Administrative Council. In view of the institutional framework and the nature of the decisions challenged, it is considered more appropriate to provide for immediate review of the decisions by the Council itself. In such cases, the President would deliver an opinion to the Council containing the relevant fact-finding and legal analysis in order to facilitate the decision-making. Upon receipt of a request for review, the Council would assess whether it is receivable before addressing the merits. A ground for irreceivability would be a request against a regulatory decision without individual and adverse effect on the employee concerned. If the request for review is receivable, the Council would take a decision on its merits. The Council also has the possibility to refer its preliminary decision to the Appeals Committee of the Office for prior opinion. The final decision of the Council to partially or totally dismiss the request for review, whether or not on the basis of the opinion of the Appeals Committee of the Office after referral, could then be challenged before the ATILO. The rules of procedure of the Administrative Council have been amended accordingly (CA/54/12).

In the case of [Judgment 3796](#)²¹ the request for review to the Council was in respect of a decision that, albeit regulatory, had an individual and adverse effect on the complainant. The intention of the new regulations was clearly that the Administrative Council – not the President - should decide on such a request.

[Judgment 3796](#) thus seems to disregard the regulatory intention of the EPO Administrative Council. The question arises whether the Tribunal was aware of this situation.

²¹ The reasoning in [Judgment 3700](#) was an *obiter dictum*. The complaint was held irreceivable on other grounds.

ANNEX 2

What to do if you are requested to withdraw a complaint in front of the ATILO in view of Judgment 3785 (composition of the Appeals Committee or Judgment 3796 (competent authority))

The Office and the Administrative Council have sent out letters informing colleagues that the final decisions have against which they have filed a complaint have been “withdrawn”, and inviting the colleagues concerned to withdraw their complaint.

We advise to proceed as indicated in these [instructions](#). The instructions explain which template ([1a](#), [1b](#), [1c](#), [2a](#), [2b](#) or [2c](#)) to use in which situation (the ANNEX 2 referred to in the instructions corresponds to this file [ANNEX 2.pdf](#)).

Important note: you need the monthly SUEPO password to get access to these documents. It has been emailed to you in a new manner, using the address webpass_munich@suepo.org. It may be the case that the corresponding message landed in your spam folder (especially relevant for users of Google - gmail- or Microsoft -outlook, live, hotmail, etc.-). Hence, if you did not receive the monthly password, please have a look in your spam folder.

Most of you should be in the situation mentioned first in the instructions, i.e. have received a withdrawal letter from the Council concerning an ATILO complaint against the new career system (CA/D 10/14) to which the Office has not yet responded.